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1982

# Neil Jorgensen v. John Clay and Company, a Corporation, and Aetna Casualty and Surety Company, a Corporation : Reply Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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NEIL JORGENSEN,

Plaintiff-Respondent,

vs.

Case No. 17621

JOHN CLAY AND COMPANY, a  
corporation, and AETNA  
CASUALTY AND SURETY COMPANY,  
a corporation,

Defendants-Appellants.

-----

REPLY BRIEF OF APPELLANTS

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Appeal from the Judgment of the  
Sixth Judicial District Court, Sanpete County  
Honorable Don V. Tibbs

-----

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Attorneys for Defendants-  
Appellants

**FILED**

JUN 11 1982

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REPLY BRIEF OF APPELLANTS

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ARGUMENT

POINT I

VENUE WAS IMPROPERLY LAID IN SANPETE COUNTY  
AND THE TRIAL COURT COMMITTED REVERSIBLE  
ERROR IN DENYING DEFENDANTS' MOTION FOR  
CHANGE OF VENUE.

Respondent argues that §78-13-6, U.C.A. is the correct venue statute to be applied in this action. (Respondent's Brief, p. 19-25). In the alternative, Respondent states that even assuming arguendo that §78-13-4, U.C.A. is applicable as advocated by Appellants that statute also requires venue to be laid in Sanpete County. (Respondent's Brief, p. 26-29). Both of these arguments, however, are erroneous.

Under no circumstances can §78-13-6, U.C.A. be applicable

to this case. It states that "all transitory causes of action arising without this state in favor of residents of this state shall, if action is brought thereon in this state, be brought and tried in the county where the plaintiff resides or in the county where the principal defendant resides. . . ." (Emphasis added).

Respondent argues that the instant case is a "transitory action" (Respondent's Brief, p. 21-22). Appellants certainly do not contest this statement and, in fact, would add that all contracts are transitory in their nature as opposed to local actions involving real property. Thus, the word "transitory" adds nothing to the interpretation now being advocated by Respondent.

The cause of action in this case did not "arise in Colorado" as claimed by Respondent. (Respondent's Brief, p. 22). Citing the same authority relied upon by Respondent, "a cause of action is said to arise generally at the place where the act creating the right to bring an action occurred." 77 Am. Jur.2d §37. (Emphasis added). The phrase "transitory causes of action arising" is different from phrases referring to "where the injury occurred which is then the place at which point the damage or wrongful act took place." Id.

Based upon the jury's verdict, the injury or wrong occurred in Colorado. The jury found that the defendant had



wrongfully failed to comply with the terms of the contract by not accepting the lambs in Colorado--the injury, therefore, occurred in Colorado. However, the right to bring the lawsuit was acquired in Utah since this is where the written contracts between the parties were made. (Respondent's Brief, p. 20). Thus, the cause of action in this case arose within the state of Utah and §78-13-6 is therefore completely inapplicable.

This Court in Buckle v. Ogden Furniture & Carpet Co., 216 P. 684 (Utah 1923) established the rule that all written contracts are to be governed by the predecessor of §78-13-4, U.C.A. This section allows a plaintiff to sue a defendant either in the county in which the defendant resides or in the county in which the contract is to be performed. As to all other types of contracts not in writing defendants "are not authorized to be tried out of the county where the defendant resides."

The Court in Buckle specifically referred to contractual actions as "transitory" when it stated that the "general modern tendency is to fix the venue of transitory actions at the residence of the defendant." 216 P. at 685.

This Court subsequently in Atlas Acceptance Corp., Floor, Palfreyman, and Simmons has consistently held that if a plaintiff is unable to prove from the face of the written

agreement the place of performance then the correct venue is at the defendant's residence. (See discussion of cases in Appellants' Brief in chief, p. 17-21). These decisions are in no way modified by the Court's decision in Dee v. San Pedro referred to by the respondent.

In Dee, the purported bona fide assignee of a cause of action for damages brought suit in the county of his residence, Weber County, for injuries to certain horses transported by the defendant railroad company, which had its principal place of business in Salt Lake County. The defendant railroad moved for a change of venue on the grounds that §2932 and §2933 of Chapter 93, Session Laws of Utah 1913, controlled venue.

The court indicated that defendant's motion was regular and sufficient, as the case stood then, to have entitled the defendant to have the action transferred to Salt Lake County. However, before the Weber County court ruled in the defendant's motion for change of venue, the plaintiff obtained permission to amend its Complaint to allege that the cause of action arose outside the State of Utah, in the states of Nevada and California. Plaintiff's amendment brought the case within the provisions of the statute, and the plaintiff elected, as provided in the statute, to bring the action in the county where he resided. The defendant renewed its motion

for a change of venue.

The determinative venue issues in Dee were in the nature of standing questions: whether the plaintiff was a bona fide assignee of the cause of action and resident of Weber County in whose favor the transitory cause of action arose; whether the person in whose favor the cause of action arose was a resident of Weber County. When the defendant had renewed its motion for change of venue, it had omitted to negative the plaintiff's assertion in his Amended Complaint that he was a bona fide assignee of the cause of action and the plaintiff's assertion in his Amended Complaint that the person in whose favor the cause of action arose was a resident of Weber County. Having failed to negative the "standing" allegations in the plaintiff's Amended Complaint, defendant's motion for change of venue was denied. Here, proper affidavits were timely filed by Defendants and therefore no standing question is presented.

The Dee case does not modify the rule established in the previously cited cases that in the absence of express terms of a written contract showing the place of performance this Court will require suit to be brought in the county of the defendant. Respondent argues, however, that the place of performance can be implied from the contract, from the course of dealings, and from the Federal Packers and Stock-

yards Act that the place of performance is Sanpete County. (Respondent's Brief, p. 26-29). Appellants would dispute that an implication obtained outside of the document itself can be utilized in determining place of performance since plaintiffs in the previously cited cases also argued extrinsic evidence which was expressly rejected by this Court. See, for example, Palfreyman in which plaintiffs argued that the maintenance of an office implied performance in the county where the office was maintained.

Assuming arguendo, however, that implications are proper Plaintiff's argument still is invalid.

Respondent 'contradicts himself when he states that:

. . . if the seller is not present to receive the check at the time of delivery of the sheep, the payment must be timely mailed first class, postage prepaid, and properly addressed to the seller. 7 U.S.C., §228b. Regs. of Sec. of Agriculture, Packers and Stockyards Act, 9 C.F.R., Sec. 201.43. (Respondent's Brief, p. 27).

Respondent's own statement reveals that Sanpete County was to be the place of performance by the payment obligation only if Respondent was not present to receive payment at the time of delivery in California or Colorado.

In 1978, Respondent had been in the sheep business for more than twenty-five years, having raised and sold lambs for over ten years and having worked with appellant John Clay and Co. for four years. Respondent maintains that, "Advance

notice to the seller prior to shipping is clearly the accepted custom and practice in the livestock industry" (Respondent's Brief, p. 10). Respondent "wanted to see that his lambe were handled property" (Respondent's Brief, p. 9).

Respondent testified to his numerous demands upon appellant John Clay and Co. for notice. (Tr. 81, 82, 84, 143-44, 325, 619, 654-55). Respondent clearly intended to be present when appellant John Clay and Co. took delivery of the lambs. The livestock contract provided: "Balance of purchase price shall be paid when livestock are loaded on cars." Where the balance of the purchase price was to be paid is specified in the Packers and Stockyards Act.

Section 201.43(b)(2)(ii) of the Act codifies the preferred practice in the livestock industry that the place of performance of the payment obligation is the place of delivery:

No . . . dealer purchasing livestock for slaughter, shall mail a check in payment for the livestock unless (a) the check is made available for actual delivery and the seller or his duly authorized representative is not present to receive payment, at the point of transfer of possession of such livestock, on or before the close of the next business day following purchase of the livestock and transfer of possession thereof. . . .

Section 201.43(b)(2)(ii) expressly contemplates that the seller or his duly authorized representative may not be

present, in which case only shall payment be mailed to the sellers to such address as the seller may direct. Thus, the payment provision in the contracts herein could read as follows applying these implications: "Balance of purchase price shall be paid when and where livestock are loaded on cars; and only if seller or his duly authorized representative is not then and there present shall payment be mailed forth-  
with to the seller to such address as the seller may direct."

Clearly, in accordance with the preferred and accepted custom and practice in the livestock industry, no one specific place can be made by necessary implication to appear from the express terms on the face of the livestock contract.

The preferred and accepted custom and practice in the livestock industry is to notify the seller so that the seller can be present to see that the livestock are handled properly and so that the seller can be present to receive payment on the spot from the dealer. Under the circumstances it cannot have been said that the necessary implication made to appear from the express terms on the face of the livestock contract was that the place of performance of the payment obligation was Sanpete County, Utah. The most that could have been said, as Respondent himself has stated, was "that if payment for the sheep was not made to Plaintiff at the time and place of delivery in California or Colorado,

payment would be made by mailing to Plaintiff's residence in Sanpete County." (Respondent's Brief, p. 27).

Utah law requires that the place of performance of obligation necessarily be made to appear by implication from the express terms on the face of the contract. Utah law does not say that venue may lie at any secondary or conditional place of payment which might be made by necessary implication to appear from the face of the written contract. California might have been the place for performance of the payment obligation; Colorado might have been the place for performance; Sanpete County might have been the place. No one specific and unconditional place for performance can have been made to appear by necessary implication from the express terms on the face of the contract.

In summary, the cause of action in this case cannot be said under theory to have risen outside of the State of Utah and, in addition, all written transitory contractual actions are governed by §78-13-4, U.C.A. If the plaintiff is able to show a place of performance he is then able to bring an action in the county where the performance is to occur. In absence of an express showing of such performance by the terms of the contract itself, however, the traditional rule applies and defendant must be sued in his own county. Here, the lower court committed prejudicial error in failing

to follow this mandatory venue requirement.

## POINT II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN SUBMITTING THE ISSUE OF PUNITIVE DAMAGES TO THE JURY AND IN SUBSEQUENTLY AWARDING ATTORNEYS' FEES WHEN THERE WAS NO BASIS UNDER UTAH LAW FOR SUCH AN INSTRUCTION.

Respondent complained against John Clay and Co. for (1) alleged breach of contract obligation to take delivery of 6,283 lambs, and (2) alleged breach of a contract obligation to pay amounts due under the contract. The livestock contracts contained no provision whatsoever for payment of attorneys' fees. The lower court awarded some \$20,000 in attorneys' fees based upon the jury's finding of \$1.00 punitive damages.

In breach of contract actions, attorneys' fees can be considered as an element of damages only in those cases in which exemplary damages are awarded. DeBry & Hilton Travel v. Capital International Airways, 538 P.2d 1181 (Utah 1978).

In DeBry, the plaintiff prayed for punitive damages and attorneys' fees by reason of the defendant's malicious conduct, and by reason of the defendant's bad faith in its conduct toward the plaintiff. An award of punitive damages was denied, and thus the trial court properly denied counsel fees. In affirming the lower court's denial of attorneys' fees, this Court cited Dahl v. Prince, 230 P.2d 328 (Utah 1951) in which the Court had reversed an award of attorneys' fees



"where there was no basis for an award of punitive damages." 583 P.2d at 1185. Appellants dispute the propriety of punitive damages in this action for breach of contract. Appellants submit that there was no basis for an award of even \$1.00 in punitive damages.

On page 31 of his brief, Respondent states:

Even the case of Lyman Grazing Association v. Smith, 24 Utah 2d 443, 473 P.2d 905 (1970) cited by Appellants states that attorneys' fees are appropriate upon a showing of fraud, malice or wantonness such as would sustain an award of punitive damages. 473 P.2d at 908.

Lyman was a suit for injunctive relief, not a suit for loss of bargain. This Court stated the rule in whole:

It is a well-established rule that a court although awarding affirmative injunctive relief to a plaintiff or complainant, will not award attorneys' fees in the absence of a showing of such fraud, malice or wantonness as would authorize an award of punitive damages. . . . 473 P.2d at 908.

Respondent confuses the rule in an action for injunctive relief in an equitable proceeding such as Lyman, with the contract law principle of:

. . . "just compensation" which requires only that a plaintiff be placed in the same position he would have occupied but for the breach. Park v. Moorman Mfg. Co., 121 Utah 2d 339, 352, 241 P.2d 914, 920 (1952).

This distinction has been stated as follows:

Thus, the defendant's motive for a breach is generally deemed irrelevant . . . unless one

who holds himself out to the community to perform special services, such as a lawyer, trust company, or realtor, assumes fiduciary duties which, if breached, subject him to punitive damages as a matter of public policy and recovery of punitive damages is improper unless the plaintiff can demonstrate that the willful and malicious nature of the defendant's breach constitutes an independent tort. 1979 Utah Law Rev., 369. (Emphasis added).

Nash v. Craigco, Inc., 585 P.2d 775 (Utah 1978) appears at first blush to suggest a departure from the long-standing rule in Utah of "just compensation" in actions for breach of contract. The Court indicated, however, that the defendant there owed the plaintiff a fiduciary duty to act in good faith and to deal fairly with the plaintiff. One commentator has stated with reference to Nash:

The defendant's breach of this duty was apparently the key to the court's determination that a jury might reasonably conclude that the defendant acted willfully and maliciously. Implicit in the court's reasoning should be the notion that a willful and malicious breach of contract, sufficient to justify an award of punitive damages, can result when a fiduciary duty exists between the parties that is apart from and in addition to their contractual duties.

Nash, therefore, should not be construed to include in its sweep every intentional breach. Efficiency in the marketplace results from permitting a party to breach a contract if he can obtain a more favorable bargain elsewhere. The right to breach should be allowed as long as the non-breaching party receives the equivalent of performance. The rule of "just compensation" should continue to be the ceiling for the breach of contractual duties. 1979 Utah Law Rev., 370.

Appellant John Clay and Co. owed Respondent no fiduciary

duty under the livestock contracts. Respondent neither alleged nor proved any independent tort to have been committed by appellant John Clay and Co. Respondent neither alleged nor proved that appellant John Clay and Co. committed any fraud. There was no basis for an award of punitive damages in the case at bar.

Respondent claims that appellant John Clay and Co. breached its duty under the livestock contracts to act in good faith toward Respondent, and that appellant John Clay and Co.'s alleged breach of such a duty entitled him to punitive damages. Respondent, however, cites no law wherein breach of an alleged duty to act in good faith has been the basis for an award of punitive damages.

Zions' Properties v. Holt, 538 P.2d 1319 (Utah 1975), is inapposite, because the implied contract covenant there concerned a covenant of good faith and cooperation preventing either party to a contract from rendering it difficult or impossible for the other party to continue performance and then taking advantage of the non-performance he has caused. Respondent did not claim that John Clay rendered it difficult or impossible for Respondent to continue performance, and that John Clay and Co. sought to take advantage of any non-performance on Respondent's part. If anything, appellant John Clay and Co. claimed that Respondent breached his covenant

of good faith and cooperation by rendering it difficult or impossible for John Clay and Co. to take delivery of the lambs before they became too heavy.

In support of his claim that a breach of a duty to act in good faith can be the basis for an award of punitive damages, Respondent cites three cases concerning the common legal principle that in every insurance contract there is an implied covenant of good faith and fair dealing. Gruenberg v. Aetna Insurance Co., 108 Cal. Rptr. 480, 510 P.2d 1032, 1037 (1973); Garrett v. American Family Mutual Insurance Co., 520 S.W.2d 102, 121 (Mo. App.); First Security Bank of Bozeman v. Goddard, 593 P.2d 1040, 1047 (Mont. 1979). The case at bar does not concern an insurance contract.

On pages 35 and 36 of his brief, Respondent sets forth "evidence" of appellant John Clay and Co.'s "attitude of reckless disregard for Plaintiff's right to be treated honestly and fairly under the contract." Respondent simply recounts matters going to the alleged breach of contract and matters going to "attempted" wrongful conduct on the part of appellant John Clay and Co. Respondent does not set forth egregious conduct akin to selling brucellosis infected cattle (Kiser v. Gilmore, 2 Kan. App.2d 638, 587 P.2d 911 (1979); or refusing to pay a valid health insurance claim (Curtiss v. Aetna Life Insurance Co., 90 N.M. App. 1976);

or fraudulently falsifying weight records (Whitehead v. Allen, 36 N.M. 63, 313 P.2d 335 (1957)).

Respondent neither alleged nor proved any breach of a fiduciary duty, any independent tort, or any fraud. No grounds under Utah law were alleged or proved upon which an award of punitive damages could be based. Respondent sued for breach of contract to recoup his loss of bargain. It cannot be said that Appellants' defense of this action was without merit or good faith. It would not comport with this Court's ideas of either law or justice to assess Appellants attorney fees for entertaining bona fide questions about his legal obligations and seeking adjudication thereon in the courts of this State. Western Casualty and Surety Co. v. Marchant, 615 P.2d 423 (Utah 1980).

Communist countries assess a fine against a defaulting promisor, payable to the injured promisee, as a "form of social criticism." In contrast, courts in this country, as in most of the rest of the world, expressly reject the notion that remedies for breach of contract have punishment as a goal, and with rare exceptions, refuse to grant "punitive damages" for breach of contract. "Legal Remedies for Breach of Contract," 70 Columbia Law Rev., 1146.

On pages 37-38 of his brief, Respondent states that "[P]unitive damages are often necessary to fully compensate

the plaintiff, particularly if the economic bargaining power of the plaintiff is inferior to the 'oppressors' (i.e., defendants Clay and Monfort.)" To assess punitive damages against appellant John Clay and Co. in this case would be contrary to all principles of contract law and past decisions by this Court. This Court must reverse the award of \$1.00 as punitive damages, since there is no evidence even for this nominal award.

In addition, of course, the \$21,400.00 attorney fees and costs is totally unjustified even assuming arguendo punitive damages are proper since the fees are some 20,000 times the punitive damages awarded. The trial court committed prejudicial error in submitting the issue of punitive damages to the jury and in subsequently awarding attorneys' fees when there was no basis under Utah law for such award.

### POINT III

THE AMOUNT OF RESPONDENT'S ALLEGED LOSS  
COULD NOT HAVE BEEN MEASURED BY FACTS AND  
FIGURES ASCERTAINABLE PRIOR TO JUDGMENT  
AND THUS THE TRIAL COURT'S AWARD OF  
PREJUDMENT INTEREST WAS PREJUDICIAL ERROR.

Four questions were presented to the jury for resolution which had a direct bearing on the issue of damages:

1. Did Respondent unduly delay the shipment of lambs and thus precipitate Monfort's refusal to take delivery of

Respondent's overweight lambs from John Clay and Co.?

2. Did Respondent's undue delay, if any, contribute to unnecessary weight gain for which Respondent sought to charge Appellant John Clay and Co.?

3. How much weight did the lambs gain unnecessarily?

4. Did Respondent mitigate his losses by accepting the most commercially reasonable offer for the 6,283 lambs?

The answers to these questions had a direct bearing on the "date certain" upon which damages should have been computed and the standards of value which should have been used to ascertain damages.

Clearly, if Respondent unduly delayed shipment and caused Monfort's refusal to take the lambs, then no damages should properly have been assessed against appellants John Clay and Co. or Aetna. If Respondent unduly delayed shipment and precipitated Monfort's refusal to take the lambs, the Appellants should not have been assessed for the weight gained by the time the lambs were finally sold to R. H. Rock. If R. H. Rock's offer of \$70.20 per head ( $\$70.20/\text{hd.} \times 6,283 \text{ hd.} = \$441,066.60$ ) was not commercially reasonable compared to appellant John Clay and Co.'s offer of \$.66 per pound up to 120 pounds ( $\$.66/\text{lb.} \times 120 \text{ lbs.} \times 6,283 \text{ lambs} = \$497,613.60$ ) then Appellants should not have been assessed the \$56,547.00 difference.

The amount of the loss for which Respondent sought prejudgment interest could not have been measured by facts and figures ascertainable at any particular fixed time prior to judgment, nor calculable with mathematical accuracy. The amount of damages must necessarily have been ascertained and assessed by the trier of fact at the trial, and thus prejudgment interest properly should not have been awarded. Bjork v. April Industries, Inc., 560 P.2d 315 (Utah 1977). This matter should therefore be remanded to the lower court for entry of prejudgment interest as to the freight and 274 lambs only.

#### CONCLUSION

Respondent failed to establish that this action fell within any one of the statutory exceptions to the general rule that persons sued have the right to have the action brought and tried in the county in which they reside or in which, as here, they maintain their principal and only place of business. The failure to allow suit to be tried in the correct county was reversible error.

Respondent neither alleged nor proved that appellant John Clay and Co. breached any fiduciary duty, committed any intentional tort, or perpetrated any fraud. Respondent merely alleged and endeavored to prove that appellant John Clay and Co. breached the livestock contracts. No basis



existed under Utah law for the trial court to submit the issue of punitive damages to the jury; the trial court's award of attorneys' fees and litigation costs to Respondent was prejudicial and improper. Respondent was entitled to "just compensation" only for appellant John Clay and Co.'s alleged breach of contract.

In order for any "date certain" or "standards of value" to have been used to calculate damages, it was necessary first for the jury to make certain of factual findings concerning any undue delay in delivery caused by Respondent and whether Respondent mitigated his losses in the most commercially reasonable manner. The amount of loss for which Respondent sought prejudgment interest could not have been measured by facts and figures ascertainable at any particular fixed time prior to judgment, nor calculable with mathematical accuracy. The trial court's award of prejudgment interest regarding the 6,283 lambs was erroneous and constituted prejudicial error. The award should be vacated.

For the preceding reasons, therefore, the judgment below should be vacated and a new trial ordered. In the alternative, the award of punitive damages, attorneys' fees and prejudgment interest should be vacated.

Respectfully submitted,

Richard Stein  
Richard Campbell  
STEIN & CAMPBELL

Craig S. Cook

CERTIFICATE OF SERVICE

I hereby certify that I hand-delivered two true and correct copies of the foregoing Reply Brief of Appellants to Arthur H. Nielsen, Stephen L. Henriod and Clark R. Nielsen, NIELSEN & SENIOR, Attorneys for Plaintiff-Respondent, 1100 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah 84111 this 11th day of June, 1982.

Kathy Davis